vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.291 OF 1998

Shri Vijay Prakash Shrivastava
c/o. Trilokilal Shrivastava
Ramsat Yadav Ki Chawl, Subhash Nagar
Bandra (E), Mumbai - 51 ... Petitioner

V/s.

M/s.Bonafide Packers
Swastik Industrial Estate
Union No.6/7, 178, C.S.T. Road,
Kalina, Bombay - 400 029 ... Respondent

Mr.H.A. Solkar for Petitioner
Mr.A.S. Khandeparkar i/b B.Amin & Co. for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **SEPTEMBER 2, 2005**
JUDGMENT PRONOUNCED ON: **SEPTEMBER 28, 2005**

JUDGMENT:

. The First Appeal challenges the award of the Commissioner for Workmen's Compensation dismissing the claim of the appellant. The appellant was employed as a Punching Machine Operator on a monthly wage of Rs.984/- with the respondent. He sustained an injury on 1.6.1985 leading to fracture of his fingers of the right hand. The Appellant after issuing notice as required under the Workmen's Compensation Act (for short, hereinafter referred to as the 'Act') filed a claim under the Act claiming compensation amounting to Rs.1,09,975/-

together with interest and penalty. This claim was made by the appellant on the basis that he had suffered total permanent disablement. The respondent deposited an amount of Rs.43,550/- towards the claim. In its written statement, the respondent contended that the appellant was employed as a helper and not as a Punching Machine operator.

2. Parties led evidence before the Court. The appellant examined himself and deposed that he sustained the injury while removing a carton from the punching machine. He was moved to Nanavati Hospital and was hospitalised for 28 days. A surgery was performed on his right palm and after being discharged from the hospital, he was required to attend the O.P.D. of the hospital for about 1.1/2 months. He has also deposed that he was paid full wages for the first month after the accident. Thereafter, he was paid only Rs.600/- per month till August 1985. The company then disallowed the appellant from continuing in employment. The appellant has contended that he is unable to do any work with his right hand after the accident and his attempts to get employment elsewhere had proved to be futile in view of his physical disability. The appellant denied the suggestion put to him in his cross-examination that he was able to do light work with his right hand. The

doctor who was examined on behalf of the Appellant has stated that the appellant had suffered extensive crush injuries on his right hand and was an in-patient in the hospital. He had examined the appellant on several occasions while he was in hospital. On 7.9.1986, the Doctor assessed his disability at 100% because of his inability to return to his previous job. The Doctor has opined that the disability is final and permanent. This witness has also pointed out in his evidence as to how the disability is assessed. The suggestion of the respondent that the disability was only 60% has been denied. The partner of the Respondent who has been examined on behalf of the respondent has deposed that the appellant was working as an unskilled worker. One of the documents produced before the trial Court was the accident report accident of the workmen submitted by the respondent to New India Assurance Company Limited, the Insurance Company for the respondent. In that document, it has been mentioned that the accident occurred when the appellant was operating the punching machine and his right hand was crushed between the die and the plate of the machine. The injury sustained by him is described as compound fracture of fingers and palm of the right hand. It has also been mentioned that the injury has caused permanent disablement.

3. All these factors, according to the appellant, are indicative of the fact that he had suffered an injury arising out of and in the course of employment which had left him totally disabled. In these circumstances, the appellant claimed 100% disability and compensation of Rs.1,09,000/- together with penalty and interest.

4. On a perusal of the evidence recorded and the documents produced before the trial Court and the judgment of the Commissioner for Workmen’s Compensation, I am of the view that the Commissioner has committed an error by dismissing the application. There certainly has been a miscarriage of justice to the prejudice of the appellant. The Commissioner has rejected the application on the ground that the loss of earning capacity was only 60% and, since the respondent had deposited an amount of Rs.43,550/- towards the compensation, the appellant was not entitled to any further amount.

5. The Commissioner, in my opinion, was wrong in assessing the disability at 60% only. In my view, it is not merely a physical disability which needs to be considered but also the loss of earning capacity of the workman. Section 4(1)(b) of the Act stipulates that

where a person has suffered from permanent disablement resulting from an injury arising out of and in the course of employment, the compensation payable is an amount equal to 60% of the monthly wages for the injured workman multiplied by the relevant factor. Where a permanent partial disablement results from an injury, the compensation payable has to be calculated on the basis of the loss of earning capacity as assessed by a qualified medical practitioner. When in the present case, the Doctor has certified that the appellant has suffered 100% disability, the Commissioner ought to have accepted the same and granted the appellant compensation. The Doctor who was examined as an expert witness, has testified that the appellant has sustained a loss of earning capacity to the extent of 100% in view of the fact that he is unable to perform the same work that he was performing prior to the accident. It is well settled that if there is an unscheduled injury, the disability must be assessed on the basis of the loss of earning capacity of the injured. The appellant has deposed that he is unable to work with his right hand at all. He has also deposed that he tried to gain employment in other establishments but was unsuccessful because of his physical disability. Therefore, it obviously would indicate that the appellant could no longer secure a job in the market. The loss of earning

capacity must be accepted as 100%.

6. In such circumstances, the judgment and order of the Commissioner for Workmen’s Compensation cannot be sustained. The Commissioner has found that the appellant was working as a punching machine operator. The Commissioner has held that nothing more would be payable to the appellant since the respondent had already paid him the amount of Rs.43,550/- which was the amount for 60% disability. The Commissioner has accepted the same and has held that the respondent was not entitled to pay the balance amount of Rs.66425/-. The Commissioner has not awarded any interest or penalty on the amount. In my view, the claim of the appellant that he was drawing Rs.984/- has gone unchallenged. The claim of the appellant for further amount of Rs.66,425/- is sustainable and must be allowed with interest as payable under the Act. The appellant is also entitled to penalty of 25% on the balance amount of Rs.66425/- as it was not paid when it fell due.

7. Appeal allowed. No costs.

8. The Learned Advocate for the Respondent seeks stay of this order. Stay granted for eight weeks from today.